

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 6, 2009 Session

CHERYL L. MONTGOMERY v. STEVEN SILBERMAN

Appeal from the Chancery Court for Putnam County
No. 07-332 Amy Hollars, Chancellor

No. M2009-00853-COA-R3-CV - Filed November 24, 2009

In this divorce action, Husband appeals the trial court's award of transitional alimony as excessive and an abuse of discretion. Specifically, he contends that the award, when combined with an earlier award of *pendente lite* alimony, resulted in a total award of alimony that was longer than the marriage; he further contends that Wife failed to establish a need for alimony. Wife appeals the trial court's decision allowing Husband to claim the tax deduction for one of the parties' children and seeks her fees for this appeal. Finding no reversible error, we affirm the trial court's judgment. Finding an award of attorney's fees to Wife appropriate, we remand the case for a determination of the amount to be awarded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Donald Capparella, Nashville, Tennessee, for the appellant, Steven Silberman.

Craig P. Fickling, Cookeville, Tennessee, for the appellee, Cheryl L. Montgomery.

OPINION

I. Factual and Procedural History

The parties to this appeal were married on June 9, 2001, and separated August 1, 2005; at the time of separation, they lived in Chevy Chase, Maryland, and had two children. Upon separation, Wife relocated to Gainesboro, Tennessee, bringing the children with her. Husband initiated an action in Montgomery County, Maryland, in September 2005, seeking to establish custody of or access to the children. An agreed *pendente lite* order was entered in the Maryland proceeding

providing, *inter alia*, that primary custody of the children would remain with Wife with Husband having visitation with the children one weekend per month. The agreement also required Husband to pay \$1,150.00 per month in alimony and \$2,109.00 in child support “until further agreement of the parties or order of a court of competent jurisdiction.” Neither party sought dissolution of the marriage in the Maryland proceeding or made an effort to modify the terms of the *pendente lite* order.

Wife initiated a divorce action in Putnam County, Tennessee, on October 26, 2007. Upon Wife’s filing of the Tennessee action, Husband submitted to the jurisdiction of the court. Trial of the case was bifurcated. Judge John Turnbull heard the first phase on August 14, 2008, and subsequently entered an order designating Wife as primary residential parent and providing a parenting schedule for Husband. Judge Amy Hollars heard the second phase on February 17, 2009, and entered a final order dividing the marital property and assets; setting Husband’s child support obligation at \$2,800.00 per month; awarding Wife transitional alimony of \$2,500.00 per month for a period of thirty months; and awarding Wife counsel fees in the amount of \$23,896.78.

Husband and Wife appeal the judgment of the trial court.

II. Statement of the Issues

Husband raises the following issue for review:

1. Whether the trial court abused its discretion in awarding transitional alimony where (1) the combined award of *pendente lite* alimony and transitional alimony resulted in a total award of alimony that was nearly two years longer than the actual marriage, and (2) the Wife failed to establish any true need for alimony?

Wife raises the following issues for review:

1. Did the trial court abuse its discretion when it awarded Wife transitional alimony?
2. Did the trial court err when it allowed Husband to claim one of the parties children as a dependent for income tax purposes?
3. Is Wife entitled to recover from Husband her attorney fees on this appeal?

III. Standard of Review

Review of the trial court’s findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(b); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court’s conclusions of law is *de novo* with no presumption of correctness afforded to the trial court’s decision. *See Kaplan*, 199 S.W.3d at 635.

IV. Discussion

A. Award of Transitional Alimony

An award of alimony is governed by Tenn. Code Ann. § 36-5-121. Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). When determining whether to award alimony the trial court is to consider the factors set forth at Tenn. Code Ann. § 36-5-121(i). While a trial court is directed to consider all the factors in light of the circumstances, the two most important factors are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007) (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Once the court has determined that an award of alimony is appropriate then the court must determine the nature and amount of the award. The court may award rehabilitative alimony, alimony *in futuro*, transitional alimony, alimony *in solido* or a combination of the types of alimony. Tenn. Code Ann. § 36-5-121(d)(1). We review an award of alimony under the abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 388 (Tenn. Ct. App. 1996).

In determining to award transitional alimony,¹ the trial court first determined that, due to the disparity in earning capacity and income between Husband and Wife as well as the gap between Wife's monthly financial needs and her income, an award of alimony was appropriate. The court determined that Wife was not in need of rehabilitative alimony,² that an award of periodic alimony was not appropriate,³ discussed other factors at Tenn. Code Ann. § 36-5-121(i), and made the award of transitional alimony "to bridge the gap, so to speak, between her married life and single life."

Husband's basic contention is that the trial court "wrongly treated the marriage as lasting seven years" and asserts that, for purposes of its consideration of alimony, the court should have

¹ As defined by Tenn. Code Ann. § 36-5-121(g)(1), transitional alimony is:

... a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

Tenn. Code Ann. § 36-5-121(g)(1).

² The court noted that, at the time of the trial, Wife had secured "good work that provides a good earning" at Tennessee Technological University.

³ *See infra*, note 6.

disregarded “the time between separation and the final hearing on divorce.” His argument is premised on his contention that the marriage lasted from June 9, 2001, until the parties separated on August 1, 2005, rather than until the final hearing in February of 2009. He asserts that the 40 month period between the date of separation of the parties and the date of the divorce, during which period *pendente lite* alimony was being paid to Wife, was a period during which the parties moved apart and established separate lives and should have been treated as a period of transition for Wife, thereby making an award of transitional alimony inappropriate. In essence, Husband’s contention is that the marriage only lasted 49 months (June 2001-August 2005) while alimony is to be paid over a total period of 70 months (40 months of *pendente lite* and 30 months of transitional), and that this results in Husband’s paying alimony for a period longer than the marriage, thereby going “far beyond the purpose of transitional alimony to allow the disadvantaged spouse to transition from the marriage.”

In *Ricketts v. Ricketts*, 2006 WL 2842717 (Tenn. Ct. App. Oct. 3, 2006), relied upon by Husband, the parties were married for a total of eighteen years. Ten years into the marriage, the wife filed a complaint for divorce from bed and board; the parties filed a marital dissolution agreement shortly thereafter. The agreement granted the wife custody of the parties’ child and provided that the husband would pay to the wife all monies he received from his military retirement and the Veteran’s Administration as child support and as funds to allow the wife to pay the debts of the parties. Seven years later, the husband filed an answer to the complaint and, in addition, sought an absolute divorce. In its disposition of the case, the trial court treated the marriage as a ten year marriage for purposes of determining whether an award of alimony was appropriate. On appeal, the wife contended that the trial court erred in treating the marriage as lasting ten years rather than eighteen, a contention rejected by this court. In so doing the court noted:

It is apparent that the only reason the parties did not obtain an absolute divorce at that time [when the marital dissolution agreement was filed] was because Wife would no longer be entitled to receive Husband’s military medical benefits. *Under these circumstances, we find that the trial court was correct in treating this as a ten-year marriage.*

2006 WL 2842717 at *8 (emphasis added).

Unlike *Ricketts*, we cannot hold, under the facts of this case, that the marriage effectively ended when the parties separated for purposes of determining whether an award of alimony was appropriate. As noted in *Ricketts* “there are no hard and fast rules for spousal support decisions . . . [and] [e]ach case involves a fact-sensitive inquiry and must be decided based on its own set of facts and circumstances.” 2006 WL 2842717 at *6 (citations omitted). The court in *Ricketts* determined, upon the totality of the facts, that the marriage should be treated as existing for ten years. The court’s holding in that regard was not determinative of the outcome and does not establish a standard that, in determining what Husband here characterizes as “the real length of the marriage,” the period that the parties are separated should be disregarded.

In our review of the trial court’s exercise of its discretion in this case, we cannot, as urged

by Husband, isolate the fact that the parties were separated for 40 months from the other facts and circumstances of the parties' marriage or view the period of separation in a vacuum. There is no reason appearing in the record why a divorce was not sought in the Maryland proceeding; neither is there an indication that the parties intended the *pendente lite* alimony to be transitional in nature.⁴ In addition, the proof at trial was that the parties separated seven months after the birth of their second child and, upon Wife's relocation to Tennessee, she was faced with the usual and customary expenditures for which awards of temporary child support and alimony, rather than transitional alimony as contemplated by Tenn. Code Ann. § 36-5-121(g)(1), were appropriate.⁵

The duration of the marriage - however determined - is just one of the statutory factors to be considered by the trial court and we must review the court's application of all factors. The trial court considered that the parties were actually married for seven years, as it was obligated under Tenn. Code Ann. § 36-5-121(i)(3) to do, and used that period as the duration of the marriage. The court also considered the fact that the parties were only together for a period of four years when it considered - and declined to award - alimony *in futuro*.⁶ Considering the record as a whole, it was not an abuse of discretion for the court to consider the actual dates of marriage in determining the appropriateness and nature of alimony to be awarded.

B. Amount of Transitional Alimony

Husband also contends that the amount of alimony awarded Wife was not supported by the evidence; specifically, that Wife failed to demonstrate the need for the amount awarded. We have reviewed the record and, considering the factors enumerated in Tenn. Code Ann. § 36-5-121(i) as a whole, find that the court did not err in its consideration and application of the factors and did not abuse its discretion in setting the amount of alimony at \$2,500.00 per month.

The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs*, 250 S.W.3d at 456-57 (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). In determining the propriety, nature, and amount of an alimony award, courts are to consider the statutory factors enumerated in Tenn. Code Ann. § 36-5-121(i). The appellate courts will not alter such awards absent an abuse of

⁴ Wife testified at trial that when she left Maryland she "thought I'd be coming back up there to live. And I was under the impression that we were going to put our marriage back together, and that's what I wanted."

⁵ *See, e.g.*, Tenn. Code Ann. § 36-5-121(b) providing that, pending a final hearing, a court may enter "any order that may be proper to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse. . . ."

⁶ The court noted:

Also in making an award of alimony, the Court considers the duration of the marriage. It was a seven year marriage. Approximately four years - - the parties were together for four years, five years in all, I think, . . . Because of the duration of the marriage, the Court would not find periodic alimony to be appropriate.

discretion. *Riggs, supra*. Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

In awarding \$2,500.00 per month in transitional alimony, the trial court expressly credited Wife's Statement of Income and Need, which reflected a monthly need of \$8,777.80 and a net monthly income of \$3,843.08. Husband contends that the statement included \$1,139.50 in special child care expenses,⁷ which were ultimately included in the trial court's calculation of Husband's child support obligation, and argues that the court erred by also including these expenses when it determined Mother's need for purposes of awarding the amount of alimony. We do not agree with Husband's characterization of the court's action.

While the record reflects that the trial court took the special child care expenses into account in determining the presumptive child support and in setting Husband's support at \$2,800.00,⁸ there is no indication that the court included these expenses in determining Wife's need for purposes of setting the amount of alimony. In setting alimony, the court explained its consideration of the factors at Tenn. Code Ann. § 36-5-121(i) as follows:

Making the award of alimony, the Court has also considered the provisions that were made with regard to the marital property, with regard to the division of the proceeds of the marital home and the allocation of the [bank, retirement and investment] accounts. The Court also considers that the parties established a fairly high and comfortable standard of living during their marriage, and that the standard of living would be best achieved for [Wife] if she has some transition period in which she will obtain some alimony to bridge the gap, so to speak, between her married life and single life.

And, finally, the Court also considers in making the award of alimony the relative fault of the parties. The Court deems it appropriate in this case to do so....

The explanation of the court is fully supported by the evidence. Initially, we note that Husband does not contest the determination that he has the ability to pay alimony and does not appeal the trial court's division of marital property.⁹ The proof is that the parties were college

⁷ The actual figure on the statement is \$1,358.80, which was reduced to \$1,139.50 by the trial court. We shall hereinafter use the \$1,139.50 figure in our calculations.

⁸ The child support worksheet is not a part of the record and we assume that the trial court correctly calculated the presumptive amount, as well as each parties' contribution. The transcript of the court's ruling reflects that it specifically considered expenses totaling \$1,139.50 in discussing the calculation of child support. The trial court also granted Husband a downward deviation of \$400.00 per month from the presumptive child support obligation for extraordinary travel expenses. In any event, neither party contends that the court erred in setting child support.

⁹ The marital residence in Chevy Chase, Maryland, was valued at between \$775,000.00 and \$940,000.00, with a liability of approximately \$454,000.00; the residence was ordered sold and Husband awarded 60% of the net proceeds
(continued...)

educated and employed throughout the marriage in positions commensurate with their educational achievements. Wife testified that, prior to the birth of their second son, she worked full-time and that after she returned from maternity leave, she and Husband decided she would only work part-time. During the time the parties were together, they employed a nanny to assist with the care of the children. Wife left Maryland after learning of Husband's infidelity and continued in her part-time employment following her relocation to Tennessee until April 2007, when her job was eliminated. She secured full-time employment at Tennessee Technological University in November 2007 at a salary of \$54,000 per year. The trial court properly considered and applied these facts in its determination. *See, e.g., Fickle v. Fickle*, 287 S.W.3d 723 (Tenn. Ct. App. 2008) *perm. appeal den.* (Tenn. Feb. 17. 2009).

We also disagree with Husband's contention that, for purposes of determining Wife's need as related to the amount of alimony, it is appropriate to both deduct the special child care expenses of \$1,139.50 from her statement of need **and** to increase her income by \$2,800.00. As noted in footnote 8, *supra*, the special child care expenses were considered by the court when it calculated support. Husband's calculation fails to recognize that the \$1,139.50 is included in the \$2,800.00 by application of the guidelines. More appropriately, adding the amount of child support awarded by the court to Wife's monthly income totals \$6,643.08, which, when subtracted from her monthly needs of \$8,777.80, results in a shortfall of \$2,134.72. This clearly shows need on the part of Wife.

Husband contends that Wife's need is further reduced by expenses she claims for property taxes, homeowners' insurance, savings and clothing. The inclusion of these items in Wife's statement is consistent with the standard of living maintained by the parties through their marriage and anticipated to be incurred by Wife in her transition to single life. Wife testified that she anticipated purchasing a home after the marital residence was sold and that the expenditures for clothing and cleaning included paying for someone to do laundry in her home once per week. These were matters which were heard and properly considered by the trial court in its determination of the amount of alimony.

C. Tax Deduction to Husband

Wife appeals the decision to allow Husband to claim one of the children as a dependent for tax purposes, contending that the court's action is contrary to the testimony of Charles Young, an accountant. Mr. Young testified that, because Husband's income exceeds \$150,000.00, Wife would receive greater benefit from the childcare tax credit and exemption deduction than would Husband.

The allocation of tax exemptions for children of divorcing parents is a matter of discretion with the trial court and the court's order in that regard is reviewed on appeal for an abuse of such

⁹(...continued)

of sale. Marital property consisting of bank and retirement accounts, totaling \$89,928.01, were divided equally between the parties. In addition, Husband and Wife, respectively, were awarded as separate property \$66,047.24 and \$130,755.50 in accounts owned by each prior to the marriage.

discretion. *See Miller v. Miller*, 1999 WL 329777, at *2 (Tenn. Ct. App. May 21, 1999); *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. Ct. App. 1993). A court abuses its discretion if there is insufficient evidence in support of its judgment. *See Travis v. Travis*, 2001 WL 261543, at *5 (Tenn. Ct. App. Mar. 16, 2001). A trial court's discretionary decision will be set aside only when it is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence. *See Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

In its ruling, the court stated:

There was a question of who will claim the children for tax purposes, and the Court heard testimony from the accountant, Charles Young, regarding the benefit, respective benefit, to the parties – the relative benefit to the parties. And even though there would appear to be a substantial benefit to Ms. Montgomery from claiming both of the children, I am going to hold that each of the parents would be allowed to claim one child. Mr. Silberman is going to be paying substantial child support, and I think, in all fairness, he needs to be able to claim one child for tax purposes.

The decision of the court to award Husband the ability to claim one child was a discretionary one, is not contrary to the evidence or applicable law and regulation and is, accordingly, affirmed.

D. Wife's Attorney's Fees on Appeal

Wife requests that she be awarded her attorney's fees incurred in this appeal. As with the trial level, an award of fees on appeal is a matter of discretion. Considering the entire record, the issues before the trial court as well as those in the present appeal, and the relative financial condition of the parties, we are of opinion that an award of fees to Wife is appropriate and, accordingly, remand the case to the Chancery Court for Putnam County for a determination of the amount of fees incurred by Wife on appeal.

V. Conclusion

For the reasons set forth above, the judgment of the of the Chancery Court is affirmed. The case is remanded to the court for a determination of the amount of attorney's fees incurred by Wife on appeal and for entry of judgment on her behalf in accordance with the determination.

Costs of this appeal are assessed against Husband.

RICHARD H. DINKINS, JUDGE